

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs April 29, 2008

PATRICK THURMOND v. HOWARD CARLTON, WARDEN

Direct Appeal from the Criminal Court for Johnson County
No. 5083 Robert E. Cupp, Judge

No. E2007-02339-CCA-R3-HC - Filed May 9, 2008

The petitioner, Patrick Thurmond, appeals from the habeas corpus court's dismissal of his petition. On appeal, he argues that his sentences are illegal because the trial court applied sentencing enhancement factors which were unsupported by the record and imposed consecutive sentencing without making specific findings of fact. Because he did not raise these issues in his petition for habeas corpus relief, he has waived our consideration of them. Furthermore, even if taken as true, his allegations fail to state a cognizable claim for habeas corpus relief. The judgment of the habeas corpus court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ALAN E. GLENN, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and THOMAS T. WOODALL, J., joined.

Patrick Thurmond, Mountain City, Tennessee, Pro Se.

Robert E. Cooper, Jr., Attorney General and Reporter, and Leslie E. Price, Assistant Attorney General, for the appellee, State of Tennessee.

OPINION

PROCEDURAL HISTORY

In 1995, a Davidson County jury found the petitioner guilty of two counts of aggravated rape, a Class A felony; one count each of attempted aggravated rape and aggravated sexual battery, Class B felonies; and one count of aggravated burglary, a Class C felony. The trial court sentenced the defendant to twenty years for each aggravated rape conviction, ten years each for the attempted aggravated rape and aggravated sexual battery convictions, and three years for the aggravated burglary conviction. The court ordered that the sentences for both aggravated rape convictions and the attempted aggravated rape conviction be served consecutively, for a total effective sentence of

fifty years. This court affirmed the petitioner's convictions and sentences on direct appeal. State v. Patrick Thurmond, No. 01C01-9802-CR-00076, 1999 WL 787524, at *1 (Tenn. Crim. App. Oct. 5, 1999), perm. to appeal denied (Tenn. Apr. 10, 2000).

Following his unsuccessful direct appeal, the petitioner sought post-conviction relief. The trial court dismissed his petition, and this court affirmed that dismissal. Patrick Thurmond v. State, No. M2005-00214-CCA-R3-PC, 2006 WL 680924, at *1 (Tenn. Crim. App. Mar. 15, 2006), perm. to appeal denied (Tenn. Aug. 21, 2006). In 2005, he filed his first petition for the writ of habeas corpus. The habeas court dismissed the petition, and this court affirmed in part, reversed in part, and remanded for the entry of corrected judgments. Thurmond v. Carlton, 202 S.W.3d 131, 132 (Tenn. Crim. App. 2006). We discern from the record that the petitioner subsequently filed a second petition for habeas corpus relief, which was dismissed by the habeas court.¹

On May 8, 2007, the petitioner filed his third petition for habeas corpus relief, alleging that his sentences are illegal because the trial court enhanced his sentences, found him to be a multiple rapist, and imposed consecutive sentencing based on facts not proven to the jury, in contravention of the United States Supreme Court's decision in Cunningham v. California, 549 U.S. ___, 127 S. Ct. 856 (2007). The State filed a motion to dismiss the petition on the basis that the petitioner had not shown that his sentences were void or had expired. The habeas court granted the motion, holding that Cunningham and its predecessor, Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004),² do not apply retroactively on collateral appeal and are inapplicable to the issue of consecutive sentencing.

ANALYSIS

On appeal, the petitioner does not allege that the habeas court erred in dismissing the petition and does not raise any of the grounds for relief contained in the petition. Instead, he argues that his sentences are illegal based on two grounds not raised in the petition: the sentencing enhancement factors relied upon by the trial court are unsupported by the record; and the trial court imposed consecutive sentencing without making specific factual findings on the record. The State responds that these allegations are not proper grounds for habeas corpus relief because they are non-jurisdictional errors in sentencing which at most render the petitioner's convictions voidable, not void. Because the petitioner did not raise these two issues in his habeas corpus petition, he has waived them for our consideration. Therefore, as we will explain, we affirm the judgment of the habeas court.

¹ The only evidence in the record regarding this petition is the habeas court's order of dismissal. It appears that no appeal was taken from this dismissal.

² Blakely held that any fact other than that of a prior conviction used to enhance a defendant's sentence must be proven to a jury beyond a reasonable doubt. 542 U.S. at 301, 124 S. Ct. at 2536. Cunningham invalidated California's determinate sentencing law because it allowed a trial court to enhance a defendant's sentence based on facts found by the judge by a preponderance of the evidence. 549 U.S. at ___, 127 S. Ct. at 868.

Whether the petitioner is entitled to habeas corpus relief is a question of law. Summers v. State, 212 S.W.3d 251, 255 (Tenn. 2007); Hart v. State, 21 S.W.3d 901, 903 (Tenn. 2000). As such, our review is de novo with no presumption of correctness given to the trial court's findings and conclusions. Id.

It is well-established in Tennessee that the remedy provided by a writ of habeas corpus is limited in scope and may only be invoked where the judgment is void or the petitioner's term of imprisonment has expired. Faulkner v. State, 226 S.W.3d 358, 361 (Tenn. 2007); State v. Ritchie, 20 S.W.3d 624, 629 (Tenn. 2000); State v. Davenport, 980 S.W.2d 407, 409 (Tenn. Crim. App. 1998). The judgment of a court of general jurisdiction is conclusive and presumed to be valid, and such a judgment can only be impeached if the record affirmatively shows that the rendering court was without personal or subject matter jurisdiction. Archer v. State, 851 S.W.2d 157, 162 (Tenn. 1993). A void, as opposed to a voidable, judgment is "one that is facially invalid because the court did not have the statutory authority to render such judgment." Summers, 212 S.W.3d at 256 (citing Dykes v. Compton, 978 S.W.2d 528, 529 (Tenn. 1998)). A petitioner bears the burden of establishing a void judgment or illegal confinement by a preponderance of the evidence. Wyatt v. State, 24 S.W.3d 319, 322 (Tenn. 2000). Furthermore, when "a habeas corpus petition fails to establish that a judgment is void, a trial court may dismiss the petition without a hearing." Summers, 212 S.W.3d at 260 (citing Hogan v. Mills, 168 S.W.3d 753, 755 (Tenn. 2005)).

The petitioner has waived both of his appellate issues by failing to raise them in his petition for habeas corpus relief. "A party may not raise an issue for the first time in the appellate court." State v. Turner, 919 S.W.2d 346, 356-57 (Tenn. Crim. App. 1995). In his petition for habeas corpus relief, the petitioner alleged that the trial court's application of sentencing enhancement factors and imposition of consecutive sentencing violated Cunningham. He did not renew that contention on appeal, arguing instead that the enhancement factors were not supported by the record and the trial court failed to make required factual findings before imposing consecutive sentencing. These arguments are distinct from the arguments in the petition and were not presented to the habeas corpus court, so we will treat them as waived. We note that, even if we were to reach the merits of the petitioner's claims, he would not be entitled to relief. Both of his allegations require proof beyond the face of the judgments to establish their invalidity, rendering them at most voidable, not void. See Summers, 212 S.W.3d at 256. Accordingly, we affirm the judgment of the habeas court.

CONCLUSION

Based on the foregoing authorities and reasoning, we affirm the habeas corpus court's dismissal of the petition.

ALAN E. GLENN, JUDGE